

1                   **UNITED STATES DISTRICT COURT**  
2                   **EASTERN DISTRICT OF MICHIGAN**  
3                   **SOUTHERN DIVISION**

4                   **TDC INTERNATIONAL CORP.,**

5                   Plaintiffs,

6                   **Case No. 08-14792**

7                   **-v-**

8                   **JAE L. BURNHAM,**

9                   Defendants.

10                   **/**

11                   **MOTION HEARING**

12                   BEFORE THE HONORABLE **ROBERT H. CLELAND**  
13                   United States District Judge  
14                   Theodore Levin United States Courthouse  
15                   231 West Lafayette Boulevard  
16                   Detroit, Michigan  
17                   **Wednesday, December 10, 2009**

18                   **APPEARANCES:**

19                   FOR THE PLAINTIFF:

20                   **ARNOLD S. WEINTRAUB**  
21                   Weintraub Group  
22                   28580 Orchard Lake Road, Suite 140  
23                   Farmington Hills, MI 48334-1569  
24                   (248) 865-9430

25                   FOR THE DEFENDANT:

26                   **MARK A. CANTOR**  
27                   **BRIAN S. TOBIN**  
28                   Brooks & Kushman  
29                   1000 Town Center, 22nd Floor  
30                   Southfield, MI 48075-9871  
31                   (248) 358-4400

32                   **To Obtain a Certified Transcript Contact:**

33                   Christin Russell, CSR, RPR, FCRR, CRR - (313) 964-2026  
34                   Proceedings produced by mechanical stenography.  
35                   Transcript produced by computer-aided Transcription.

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1      Detroit, Michigan

2      December 10, 2009

3      10:00 a.m.

4                    \*         \*

5                    (Call to Order of the Court.)

6                    THE CLERK: Calling case No. 08-14792. TDC

7                    International Corporation vs. Jae Burnham.

8                    THE COURT: And for Plaintiff, first?

9                    MR. WEINTRAUB: Arnold Weintraub, your Honor.

10                  THE COURT: Mr. Weintraub.

11                  And for Defendant?

12                  MR. CANTOR: Mark Cantor and Brian Tobin, your  
13                  Honor.

14                  THE COURT: All right. Counsel, this is Mr.  
15                  Burnham, as Defendant, his counsel's motion to withdraw  
16                  from representation on this matter. And that is your  
17                  motion, principally, Mr. Cantor.

18                  MR. CANTOR: Thank you, your Honor.

19                  THE COURT: I have, in addition, just initially,  
20                  you would note here that I, in setting this hearing,  
21                  directed that the defendant should personally attend. And  
22                  you'll comment on that, I know.

23                  MR. CANTOR: Correct, your Honor.

24                  THE COURT: Go ahead.

25                  MR. CANTOR: First of all, Mark Cantor. I think

1       it may be defendant or defendants.

2           THE COURT: It is -- well, it's a d/b/a.

3           MR. CANTOR: Right.

4           THE COURT: Quick and Easy Moving and Quick and  
5       Easy Moving, LLC.

6           MR. CANTOR: This is actually -- usually these  
7       matters are fairly simple, motions to withdraw as counsel.  
8       There's the state rule of ethics and the rules that govern  
9       lawyers set forth conditions upon which a lawyer can  
10      withdraw from representation. Usually there's breakdown in  
11      the attorney/client relationship, very often relates to not  
12      being paid, disagreement, things like that.

13          This case is somewhat unusual, which is why I  
14      wanted to come down, is because one of the issues that's  
15      been coming up a lot is when does representation terminate  
16      of a client.

17          This one, the activities occurred shortly after  
18      the final judgment in the case. But it's interesting, I've  
19      settled cases over the last 20 years here. In the system,  
20      I guess under this scenario, I'm still counsel for them,  
21      even after the case has terminated, even though I may not  
22      have done work for them in ten years. It's a very  
23      interesting issue. It creates incredible liability issues  
24      for us as well, which we go around with our carrier all the  
25      time about do you send termination of representation

1       letters once you finish a lawsuit, which even under today's  
2 scenario wouldn't help me because I'm still of record in  
3 the federal court system. So it's a very interesting  
4 issue.

5                  In this particular case, you ordered the  
6 defendant to be here. The defendant was notified to be  
7 here. And we have provided the Court with an e-mail we  
8 received this morning. It was sent about four a.m. I  
9 think we got it seven or eight a.m., in which he said  
10 because of the weather, he said to please apologize to the  
11 Court and let you know he could not attend. We provided  
12 that to the Court and to Mr. Weintraub to review.

13                 The interesting issue in this case is that after  
14 we settled the case, we terminated our representation with  
15 Mr. Burnham. We provided the Court with a copy of that  
16 letter. Mr. Weintraub, we discussed this earlier, believes  
17 that Brooks Kushman should have some obligation towards the  
18 settlement because we signed the consent judgment, which by  
19 the way, we were required to do under the rules anyway. In  
20 fact, your office called me -- I was in front of Judge  
21 Borman -- to come down here and sign it.

22                 And it's a very interesting theory as to whether  
23 a law firm can be held responsible for the settlement  
24 obligation of a client in a lawsuit. I think I haven't  
25 seen any authority for that, but I think it would be quite

1      a unique ruling. And it would certainly change the nature  
2      of attorney/client relationship to rule on something like  
3      that. But I think at this point, that issue hasn't been  
4      flushed out enough and I don't think it's appropriate.

5                  More importantly, in this case, the basis for  
6      withdrawal is more, that I believe, clerical in this case.  
7      We provided a letter that we terminated our attorney/client  
8      relationship after the case was settled. There's been  
9      nothing in the record to contradict that, not by Mr.  
10     Burnham who has received notice of everything, not by the  
11     plaintiffs, who have also seen that letter. Our  
12     attorney/client relationship ended upon sending that  
13     letter. The only reason we're still of record is because  
14     the way the federal court system works today, we seem to be  
15     of record forever once you're in the electronic system.

16                So the question should be, should we be allowed  
17     to withdraw. I believe we should, where there is no longer  
18     an attorney/client relationship.

19                Now, the other issue that we discussed briefly,  
20     and I just want to comment on it, in chambers, is that what  
21     we knew or didn't know, what we discussed with Mr. Burnham  
22     prior to the settlement being signed. Unfortunately, I am  
23     not at liberty to discuss that with the Court. That did  
24     constitute attorney/client communications. It is not my  
25     privilege to waive. It's only Mr. Burnham's privilege to

1        waive, and at least as of this point, it's not waived.

2                And I think your Honor's directive to have him  
3 here would have been a good one, because then he could have  
4 said what we discussed, it's his to waive. Or he could  
5 have said to me, Mr. Cantor, go ahead, you're free to tell  
6 them what we discussed. I can only tell you it has been my  
7 practice for years, when I enter into something, I fully  
8 expect that my client will comply with it. And I can't  
9 really go much beyond that with this case.

10              Other than that, I think it's a very simple  
11 motion. It's a motion to withdraw. And I think anything  
12 beyond that is really beyond the scope of what we're here  
13 for.

14              THE COURT: Thank you, Mr. Cantor.

15              Mr. Weintraub?

16              MR. WEINTRAUB: Yes, your Honor. Thank you.

17              From my perspective, I don't think it's that  
18 simple, your Honor. One thing I must point out is that we  
19 don't know Mr. Burnham's position about permitting Brooks &  
20 Kushman to withdraw with respect to this matter. And I  
21 think from my perspective, we've wasted the time by coming  
22 down here without knowing Mr. Burnham's position.

23              I note that the e-mail came in at 3:50 this  
24 morning. Obviously, someone was at Brooks & Kushman's  
25 office this morning to retrieve this. And I think a simple

1 phone --

2 THE COURT: No. That, I think the implication  
3 would be that someone was at the sending address in order  
4 to hit the button to dispatch it.

5 MR. WEINTRAUB: You got this this morning.

6 MR. CANTOR: Your Honor, we got it on our  
7 Blackberries. And then Mr. Tobin was downtown, he went  
8 over and printed it out at Kinko's.

9 THE COURT: I understand it was sent this morning  
10 early.

11 MR. WEINTRAUB: Yeah, 3:50 a.m.

12 THE COURT: Okay.

13 MR. WEINTRAUB: I, if Mr. Burnham wasn't here,  
14 then we could have been contacted and not spent the time to  
15 come down here. But all that aside, because I still think  
16 it's important to get Mr. Burnham's position as to the  
17 propriety of the withdrawal.

18 I saw the letter for the first time that they  
19 sent to Mr. Burnham when they attached it to the motion.  
20 And I do believe it's the client's, just as much as its  
21 counsel, their client's position as to whether or not he  
22 wants them to withdraw. And I do believe that he has to be  
23 here in order to fully resolve that issue.

24 But more importantly, your Honor, and as we  
25 discussed in chambers -- and Mr. Cantor is right, there's

1      really probably no authority on this. I've heard it  
2      hypothesized by other judges that it is undoubtedly  
3      counsel's ethical and moral obligation that when they have  
4      a client execute a settlement agreement that's been  
5      negotiated, that they have the obligation, as I said, to  
6      ensure, at least to the best of their ability, that the  
7      terms and conditions are complied with.

8           As this Court is aware, the settlement agreement  
9      provided in paragraph 1 that there should be a charitable  
10     donation in the amount of \$1,500 to North Star Junior  
11     Sailing of Harrison Township, concurrent with the execution  
12     of this agreement. It didn't call for payouts, didn't call  
13     for anything - concurrent.

14           I believe that counsel had the obligation to  
15     assure that that check was posted, that the donation was  
16     made concurrent with the execution, and that's what this  
17     provided. This was done on June 10th. And I don't believe  
18     that this settlement agreement was signed in vacuo.

19           And it was only I began badgering, and I'll admit  
20     it was badgering, I kept on asking where is the check?  
21     Where is the donation? And I was always rebuffed. In  
22     fact, it went so far, your Honor, as I was told that Mr.  
23     Burnham had contacted my client and left messages at phone  
24     numbers. I have checked with my client. My client is  
25     here. No such phone call was ever made. But most

1      importantly, ab initio, the settlement agreement wasn't  
2      complied with when counsel had their client execute the  
3      settlement agreement. They knew or should have known that  
4      there was no charitable donation made concurrent with the  
5      execution of the settlement agreement. And, therefore, to  
6      permit counsel to withdraw basically exonerates them for  
7      the failure or more importantly, the misrepresentation  
8      contained within the settlement agreement.

9                  I would submit to the Court, that the failure to  
10        have the concurrent donation was a clear misrepresentation,  
11        which Mr. Burnham entered into and counsel, I would  
12        suggest, knew or should have known of that, and therefore,  
13        not permitted Mr. Burnham to sign the settlement agreement  
14        or not have him sign the settlement agreement until that  
15        donation was made.

16                  Thank you, your Honor.

17                  THE COURT: All right. Anything further, on any  
18        of those points, Mr. Cantor?

19                  MR. CANTOR: No, I don't believe so, your Honor.  
20        I think it's, it's again, I go back to the point that is  
21        that clients agree on their own. We are all big boys and  
22        girls here. They signed it and they agreed to it. I can't  
23        trace my clients afterwards to see if they are going to do  
24        it. Every time Mr. Weintraub called, we communicated to  
25        our client, we tried to make calls, we followed up the best

1       we could. We did everything we could to try and do this,  
2 you know. You met my client, your Honor, when he was here.  
3 And I think that hopefully he'll come in next time you  
4 order him to come in and you can ask him about this.

5           But the more interesting issue to me is they say  
6 we don't have any indication whether Mr. Burnham objects or  
7 consents to this motion to withdraw. He just communicated  
8 with the Court. He didn't say anything about objecting to  
9 it. He knows we're withdrawing. He's got a copy of our  
10 motion. And he knows he was supposed to come here today.  
11 And he knows he owes the money, too.

12           I mean, I think that what's happening here is  
13 we're taking a very small matter and blowing it away out of  
14 proportion. I mean, he'll have to comply with the  
15 settlement and your injunction. And the fact we're no  
16 longer counsel has nothing to do with that.

17           THE COURT: I agree upon consideration of the  
18 motion and the presentations here that the Brooks Kushman  
19 Firm should be permitted to formally withdraw. And I note  
20 the July 8th letter, which followed two weeks following the  
21 signing, the final signing of the injunction and the  
22 agreement to settle. The July 8th letter indicated very  
23 clearly to the defendant that there would be no further  
24 representation provided. And all this is of course against  
25 a background of counsel not having been paid in the first

1       instance. I recollect that was one of the earlier things  
2       that was noted.

3                   Mr. Tobin had come in and continued at the  
4       Court's urging to try to arrange an appropriate resolution  
5       of the case, which had already been discussed. So to a  
6       certain extent, it seems to me the firm and counsel's firm  
7       has provided a service pro bono here for a civil litigant.

8                   But irrespective of that, and frankly unrelated,  
9       not motivated in any way by that observation, it is clear  
10      to me that the defendant has an ample notification of this  
11      hearing, has for whatever reason, whether the stated reason  
12      or something else, not appeared today in order to be able  
13      to state his view.

14                  And I would say further that if he were in  
15      agreement with the proposed withdrawal, the withdrawal  
16      would be permitted. And unless he said something very,  
17      very persuasive, were he in disagreement with the proposed  
18      withdrawal, it would still be permitted. So the client's  
19      view in this, under the present circumstances, would have  
20      little weight in the Court's determination.

21                  I set hearings such as this in motions to  
22      withdraw from representation and direct that the client be  
23      personally present on the record, principally to  
24      communicate clearly with the client so that the client  
25      knows without doubt what is going on and what will be the

1      || impending obligations, responsibilities, deadlines and so  
2      || forth, and to provide something of a last-ditch opportunity  
3      || for the client to say something that may be persuasive with  
4      || respect to whatever the basis may be, the stated basis of  
5      || the attorney's desire to withdraw from representation.

6                 Sometimes it's lack of communicativeness, lack of  
7      responsiveness to the attorney's requests for interviews  
8      and documents and so forth. And the client does provide  
9      something persuasive and says I have been lax, but I will  
10     not be in the future. I intend to meet with my attorney  
11     today. I have the documents with me. We can repair this  
12     relationship and go on. In instances such as that, I've  
13     said, well, let's just continue the representation at least  
14     for the time being and see if it can be made to work.

15                In a case such as this, it's a different  
16     scenario. I think that the case concluded, at least on  
17     paper, and that shortly thereafter, Mr. Tobin's  
18     representation concluded as well, also on paper and  
19     functionally. It remains the client's obligation to live  
20     up to what he signed, less so the attorney's obligation to  
21     pay or to enforce the settlement, so forth.

22                But for reasons that I have expressed and reasons  
23     stated in the motion, I'm going to grant the motion to  
24     formalize the withdrawal of Mr. Tobin and Mr. Cantor and  
25     the firm.

1           The motion to enforce the judgment was filed on  
2 the 18th of November, I note. The briefing was stayed on  
3 the 3rd of December when I saw the motion to withdraw from  
4 representation. The response to the motion to enforce the  
5 judgment would have been due on the 14th of December, I  
6 note. It would actually be overdue this week if it were  
7 not construed as a dispositive motion. But I'm assuming  
8 that it would have been due on the 14th of December, which  
9 is Monday next.

10           I will today enter an order allowing withdrawal  
11 of the defendant's attorneys; make it clear that the  
12 defendant is either going to be in a position of  
13 self-representation or he may rapidly acquire the services  
14 of a substitute attorney; and make clear also that any  
15 response to the motion to enforce the settlement agreement  
16 shall be due on or before the 28th day of December, which  
17 would be two weeks post deadline, assuming that I am  
18 correct on my calculation of December 14th.

19           I recognize the possibility that on or before  
20 that day, it is conceivable that a substitute attorney may  
21 communicate with Mr. Weintraub and possibly arrange by  
22 agreement some alternate date of response or something of  
23 that nature. But it seems to me the likelihood of that is  
24 slim. I only note that it has happened in some cases where  
25 a substitute attorney has come in, asked for some

1       additional time or other accommodation, as often as not,  
2       it's granted.

3                 Let me say one other thing. I had counsel in  
4       chambers for an initial discussion on these motions upon  
5       learning that the defendant had not personally appeared. I  
6       was not aware that Plaintiffs were personally present  
7       today. And although my thought was that we might have been  
8       able to have resolved this motion without an actual  
9       in-court formal appearance, that assumption was made based  
10      upon a belief there was no one here but lawyers. And I  
11      would not have called counsel in to try to get their  
12      positions in an off-the record setting had I known that  
13      clients were here.

14               And I think it is good to have an in-court, open  
15      court, on-the-record discussions in these matters whenever  
16      a client is here. And I just want to say that so the  
17      clients understand there was nothing surreptitious intended  
18      or out of the ordinary intended in that regard. And I  
19      thank counsel for their courtesies in that respect as well.

20               Nothing else for the record, Mr. Weintraub, or do  
21      you have anything?

22               MR. WEINTRAUB: A couple things, your Honor.

23               Knowing that you have set the date December 28th,  
24      assuming arguendo based upon past conduct, if Mr. Burnham  
25      fails to respond, does not get substitute counsel, will the

1      Court then issue a contempt citation? And if so, we will  
2      need an address for Mr. Burnham.

3                THE COURT: I think that there is an address in  
4      that e-mail, isn't there?

5                Is there an address, Mr. Cantor.

6                MR. CANTOR: Yes, your Honor. We'll be happy to  
7      provide Mr. Weintraub with a last known address we have for  
8      him. In fact, here's the letter where we sent the motion  
9      to him.

10               MR. WEINTRAUB: It's Grand Ledge.

11               MR. CANTOR: Yeah. Here is the letter.

12               MR. WEINTRAUB: I know. I have that.

13               MR. CANTOR: The termination letter is the same  
14      address. The termination letter we attached, it's got his  
15      address on there as well.

16               THE COURT: That is what you believe to be his  
17      mailing address?

18               MR. CANTOR: Yes.

19               THE COURT: And of course, there's also the  
20      e-mail address.

21               MR. CANTOR: Correct.

22               THE COURT: Which might not be a bad idea to  
23      communicate.

24               MR. WEINTRAUB: The e-mail address doesn't  
25      obviously help us if the Court is going to issue a contempt

1 citation. It has to be served.

2 THE COURT: I'm sorry?

3 MR. WEINTRAUB: He would have to be served  
4 personally.

5 THE COURT: Indeed. Indeed. If nothing happens  
6 on or before the 28th of December, if there's silence, then  
7 your motion already seeks -- let's see.

8 MR. WEINTRAUB: It seeks enforcement.

9 THE COURT: Enforcement in general, yes.

10 MR. WEINTRAUB: I can let --

11 THE COURT: I would, based upon your motion and  
12 the way that it is phrased and the prayer for relief, after  
13 the 28th of December, in the event that there is nothing  
14 else filed, an appearance of an attorney, a response to  
15 the motion or something of that nature, I would issue an  
16 order to show cause with a date set some time in January  
17 why Mr. Burnham should not be held in contempt of court for  
18 failure, among other things, failure to answer or to  
19 respond to the motion and substantively failure or  
20 apparently failure at least to comply with the settlement  
21 agreement that he had signed. So I would trigger that on  
22 my own.

23 It would also be important, however, for Mr.  
24 Cantor, Mr. Tobin to ensure that the order that I enter  
25 with the deadlines and the cautions that it's going to

1 express is, in fact, provided to Mr. Burnham, and you  
2 confirm that that be done. I will probably actually  
3 include a proviso in the order that directs you as a  
4 condition of withdrawing, to state on the record or file  
5 something in the record, a notation that a copy of the  
6 Court's order has been delivered to Mr. Burnham and that  
7 you are assured that he has indeed received it.

8 MR. CANTOR: Your Honor, we plan on any thing --  
9 once you issue the order, we plan on getting it to him as  
10 best we can, where we know he is now. And we'll also try  
11 to call him and tell him what you said today so he knows  
12 how serious this matter is.

13 MR. WEINTRAUB: So the notices will be sent  
14 certified return?

15 THE COURT: Well, you mean from the Court?

16 MR. WEINTRAUB: No. From Mr. Cantor to Mr.  
17 Burnham.

18 THE COURT: To assure -- methodology is not so  
19 important as to have confirmation from counsel on the  
20 record, that counsel is assured that Mr. Burnham has in  
21 hand the Court's order. That can be done six different  
22 ways that I can think of.

23 MR. WEINTRAUB: Right.

24 THE COURT: The methodology is not as important  
25 as the result. All right?

1                   MR. WEINTRAUB: Thank you, your Honor.

2                   MR. CANTOR: Thank you, your Honor.

3                   THE CLERK: All rise. Court is now in recess.

4                   (Proceedings adjourned at 10:35 a.m.)

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2                   **CERTIFICATE OF REPORTER**

3                   As an official court reporter for the United  
4 States District Court, appointed pursuant to provisions  
5 of Title 28, United States Code, Section 753, I do hereby  
6 certify that the foregoing is a correct transcript of  
7 the proceedings in the above-entitled cause on the date  
8 hereinbefore set forth.

9

10

11

s/ Christin E. Russell

12

Christin E. Russell, CSR, RPR, FCRR, CRR

13

Federal Official Court Reporter

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